86-1139

Supreme Court, U.S.
FILED
JAN 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT J. NEVILLE,

Petitioner,

- against -

FRANK A. FINNERTY, JR., Chief Counsel, KENNETH J. LUCEY, Chairman, and the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT J. NEVILLE
Petitioner, pro se
5-31 50th Avenue
Long Island City
New York 11101
(718) 361-7400

QUESTIONS PRESENTED

1. Whether there is a constitutional right of public access to attorney disciplinary proceedings.

2. Whether the denial of a hearing on the merits of petitioner's claims in the courts below and the denial of appellate review constitute a denial of due process of law.

INTERESTED PARTIES

The following parties have an interest in the outcome of this case:

ROBERT J. NEVILLE (petitioner),

FRANK A. FINNERTY, JR., Chief Counsel of the Grievance Committee for the Tenth Judicial District,

KENNETH J. LUCEY, Chairman of the Grievance Committee for the Tenth Judicial District, and the

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT (respondents).

The members of the Grievance Committee have refused a demand that they identify themselves, and petitioner does not know any of their names.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The orders of the courts below appear in the appendix hereto. Except for an order made by the Supreme Court of the State of New York, they were issued without comment or opinion.

JURISDICTION

The decision of the court below denying a motion for reargument was entered on October 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT: "Congress shall make no law * * * abridging the freedom of speech * * * ."

FOURTEENTH AMENDMENT: " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATUTE: Section 90, subdivision 10, of the Judiciary Law of the State of New York appears in the appendix hereto.

STATEMENT OF THE CASE

A. The Facts

In 1980, petitioner filed a complaint of professional misconduct against an attorney, Walter D. O'Hearn, Jr., for his role in an estate fraud. In dismissing the complaint, the Grievance Committee for the

Tenth Judicial District stated that "its thorough investigation disclosed no evidence" of misconduct. In a subsequent communication, it stated that the complaint was found to be "without merit."

In the 20-month period during which the complaint was pending, the Grievance Committee brought formal charges against O'Hearn for his guilty pleas in a waterfront corruption case. He had admitted, among other things, making false sworn statements and making 20 unlawful payments totaling $250,000 to officials of two labor unions in two unrelated cases. He was publicly censured by the Appellate Division of the Supreme Court in 1983.

In disbelief at the lenient discipline that had been imposed, petitioner undertook a review of the matter in 1984, and discovered that the Grievance Committee had misrepresented the facts in the disciplinary proceeding and suppressed evidence of O'Hearn's crimes. Its disre-

gard for the facts, and its apparent disregard of allegations that O'Hearn permitted his company to engage in massive, systematic fraud, causes petitioner to entertain serious doubts about its investigation of his complaint. The Committee refused his demand for information about its handling of the complaint, and refused to reveal, pursuant to a second demand, whether it was reopening the formal hearing on the waterfront-related charges.

Petitioner applied to the Appellate Division for relief, but his applications were denied. The court did not comment on his assertion of a First Amendment right of access to formal disciplinary proceedings. Matter of Neville v. Finnerty et al. was then commenced under Article 78 of the Civil Practice Law and Rules of the State of New York for a hearing on the merits.

The courts of the State of New York have consistently denied petitioner a hearing on the merits of his claims.

B. The Proceedings in the Courts Below

(1a) Matter of Neville v. Grievance Committee for the Tenth Judicial District. Appellate Division. Two applications to compel the Grievance Committee to release records and information. No legal papers served. No appearance by respondent. Applications denied without comment in November 1985 in an apparent exercise of discretion.

(1b) Same case. Court of Appeals. MOTION FOR LEAVE TO APPEAL denied in February 1986. Motions for recusal and for reargument also denied. Appeal taken as of right withdrawn.

(2a) Matter of Neville v. Finnerty et al. Supreme Court, Nassau County. CPLR ARTICLE 78 PROCEEDING brought pursuant to the New York Freedom of Information Law. Petition dismissed in April 1986 on the grounds that the court lacks jurisdiction and that the first two courts held that relief was inappropriate.

(2b) Same case. Appellate Division. APPEAL. Motion for transfer to another judicial department, or for leave to appeal to the Court of Appeals, or for time to seek appellate review of denial of motion for transfer. Motion denied in June 1986. Cross motion to dismiss appeal granted.

(2c) Same case. Court of Appeals. APPEAL taken as of right, on constitutional grounds. Appeal dismissed on motion in September 1986. MOTION FOR LEAVE TO APPEAL and motion for recusal denied. Motion for reargument denied.

C. How Federal Questions Were Raised

Petitioner first asserted a First Amendment right of public access to attorney disciplinary proceedings on September 17, 1985. (The table of contents of petitioner's memorandum of law of that date appears in the appendix hereto.) That was at the earliest stage of the proceedings in this matter, before any court decisions had been made. At the Court of Appeals level in both cases (Matter of Neville v. Grievance Committee and Matter of Neville v. Finnerty et al.), and at the Appellate Division level in the second case, petitioner asserted a Fourteenth Amendment right of access to the courts for a hearing on the merits of his claims before an impartial tribunal. (Petitioner alleges that the Appellate Division, Second Department, is not an impartial tribunal.) The courts below declined to address the federal questions raised by petitioner.

REASONS FOR GRANTING THE WRIT

I.

THE PRINCIPLES RECOGNIZED IN RICHMOND NEWSPAPERS APPLY WITH EQUAL FORCE AND GREATER LOGIC TO ATTORNEY DISCIPLINARY PROCEEDINGS, WHERE SECRECY UNDERMINES PUBLIC CONFIDENCE IN THE SYSTEM OF JUSTICE

The decision of this Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), established for the first time that the right of public access to criminal trials is protected by the First Amendment. The following principles were recognized in the case:

> [Public access] discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality. [p 569] * * * [The] expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. [p 575] * * * [T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch * * * . [p 584] * * * As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule

> in ancestral England and in our own Nation. [citation] Such abiding adherence to the principle of open trials "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." [citation] [p 593] * * * Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. [p 595]

Attorney disciplinary proceedings in New York State are judicial proceedings which are quasi-criminal in nature. (See Mildner v. Gulotta, 405 F.Supp. 182, 191, 1975, an action to declare Judiciary Law § 90 unconstitutional on other grounds. See also Middlesex County Ethics Committee v. Garden State Bar Association, 475 U.S. 423, 433, 1982.) In no other kind of judicial proceeding is there a greater need - because of the self-regulatory aspect - to guard against the misconduct of participants and decisions based on secret bias or partiality. In no other

kind of judicial proceeding does secrecy pose a greater threat to public confidence in the system of justice.

The background facts in this case provide the most striking example that can be imagined of the effect that public access has on the outcome of legal proceedings. The Waterfront Commission of New York Harbor held a hearing to determine the fitness of Walter O'Hearn and his associates to continue to operate a stevedoring company. Its hearing preceded the Grievance Committee hearing by five months in 1981. The factual circumstances which gave rise to the charges in both proceedings were the same. The legal defenses were the same. While the disciplinary proceeding was closed, a newspaper reporter was in daily attendance at the Commission hearing. The administrative judge for the Commission reached a conclusion which is diametrically opposed to the conclusion reached

by the referee at the disciplinary hearing: the judge found that the attorney's credibility was "considerably impaired" and that he and his associates (including two other lawyers) "lack good character and integrity," while the referee was "impressed" with his sincerity and integrity.[1]

In a case which must stand as a beacon of hope to complainants in a process which is inherently unfair, where complaints are routinely dismissed without investigation,[2] the Supreme Court of Appeals of the State of West

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[1] This was said of the respondent and his witnesses collectively.

[2] A 1976 study by the American Bar Foundation, the most recent of its kind of which petitioner is aware, found that between 91 and 97 percent of all complaints against attorneys in the jurisdictions surveyed (California, Illinois, Michigan and New York's First Judicial Department) were dismissed without any investigation. (American Bar Foundation Research Journal, 1976, no 3, p 982)

Virginia not only opened formal disciplinary proceedings to the public after finding that closure violated the State constitution, but directed that information about dismissed complaints also be made available. (See Daily Gazette v. Committee on Legal Ethics, 326 S.E.2d 705, 1984.) Citing Richmond Newspapers in support of its decision, the court observed:

> [I]f the legal profession's practice of self-regulation is to remain viable, the public must be able to observe for themselves that the process is impartial and effective. [p 711, emphasis in original]

Petitioner's right of access to disciplinary proceedings is defeated by the respondents' refusal to reveal whether a certain formal disciplinary proceeding is pending -- in a matter in which most of the evidence was provided, from public records, by the petitioner himself after he became aware of the misconduct of the participants in the case.

Petitioner would have provided the evidence sooner, during the original proceeding, if it had not been closed to the public.[3] While the original proceeding was in progress, both the Grievance Committee and the Appellate Division declined to acknowledge, in response to petitioner's inquiry, that it was pending. The unfortunate result was that the court did not become aware of the irregularities in the case until it was too late. The result, however, might have been even worse: the Committee had favored private discipline, which would have ensured that the records, and the irregularities, would have remained hidden forever.

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[3] Petitioner did, in fact, provide some information while the formal proceeding was pending which the Committee should not have ignored, but he could not provide all of the information that was needed. For example, three of O'Hearn's character witnesses were his own attorneys; petitioner could have pointed that out immediately.

As early as 1685, it was recognized that public access to legal proceedings can be of direct benefit to the judicial process. In his Remarks upon Mr. Cornish's Trial, 11 How.St.Tr. 455, 460, the Solicitor General of England, Sir John Hawles, stated:

> The reason that all matters of law are, or ought to be transacted publicly, is, That any person, unconcerned as well as concerned, may, as amicus curiae, inform the court better, if he thinks they are in an error, that justice may be done: and the reason that all trials are public, is, that any person may inform in point of fact, though not subpoena'd, that truth may be discovered in civil as well as criminal matters.

In his Treatise on Judicial Evidence (1825), Bentham recognized the benefits of public proceedings:

> Publicity is the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes * * *. [p 67] * * * Nay, it has often happened, that individuals of the audi-

> ence, who were acquainted with some fact relative to the depositions, have given useful information to the judge. [p 68] * * * The audience is the true court of appeal, in which the decisions of the tribunal are judged and estimated according to their real worth. What a higher court could never do but imperfectly, and with much waste of time and expense, is performed by this great committee of the public without delay, without expense, and with incorruptible integrity * * * . [p 70] * * * [W]ithout [publicity], all imaginable precautions are but cobwebs. [p 71] * * * Tribunals have always been odious in proportion to their secrecy. * * * If they have nothing to fear from the public eye, why wrap themselves up in darkness? Why convert the temple of justice into a cavern as secret as a den of robbers? If they meet with undeserved reproaches, what right have they to complain? [p 71]

II.

THE PRESENT STATE OF LAWYER DISCIPLINE IS A NATIONAL SCANDAL

In 1970, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement said that the state of lawyer discipline was nothing short of "scandalous." Little has

changed in the intervening years in the 30-odd states which still have closed proceedings. The prevalence of lawyer-dominated grievance committees operating in secrecy ensures that the scandal, and the unrelenting criticism of the system from observers on all sides, will continue. Criticism comes both from the public and from within the legal profession and the judiciary. The former Chief Justice of this Court, Warren Burger, stated in his remarks at the annual meeting of the American Bar Association on August 11, 1986:

> Our profession, including the Judiciary, must assume responsibility for meaningful disciplinary proceedings. Up to this date, we have not done so adequately.

Criticism also comes from the press:

> A hard-hitting series by Arthur Browne, chief investigative reporter of the Daily News, confirmed what a lot of people long have suspected about the present system for disciplining crooked lawyers. It is a farce. * * * It's a damn outrage. A teenager in the Bronx gets sent

> up the river for a two-bit heist and a big-time lawyer gets off scot free after stealing thousands. The lawyers and the judges who took part in this ripoff of justice should themselves be jailed. Even this late, they should be charged, indicted and convicted like any ordinary felons. * * * It's a crime to cover up another lawyer's misdeeds, even in secret legal grievance proceedings. * * * One of the few members of the profession who has had the guts to challenge that traditional closed-door process is Francis Murphy, presiding justice of the appellate division that polices the lawyers of Manhattan and the Bronx. * * * Murphy's proposals, naturally, were totally ignored by his legal and judicial colleagues. * * * The secrecy continues to flourish. ["Protecting Crooked Lawyers," Editorial, New York Daily News, March 16, 1981]

Editorials of this kind may arouse the public, but they have no effect on the operation of the disciplinary system. This editorial was published while the formal proceeding to discipline Walter O'Hearn was pending, and the disciplinary cases which caused the editors such distress were within the jurisdiction of the same court, the Appellate Division,

Second Department.

In an article published in the New York Law Journal on January 15, 1986, Francis T. Murphy, Jr., Presiding Justice of the Appellate Division, First Department, stated:

> The New York Times [see, e.g., the editorial on December 13, 1985] and other major newspapers of this state so uniformly oppose the secrecy of lawyer disciplinary proceedings that one wonders why a secrecy so abhored has lasted so long. [p 31]

The Departmental Disciplinary Committee for the First Judicial Department, the Association of the Bar of the City of New York and the American Bar Association have also called for open disciplinary proceedings.

III.

IN DENYING PETITIONER A HEARING ON THE MERITS, THE COURTS BELOW HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PRACTICE AS TO INVITE THE ATTENTION OF THIS COURT

The dissenting opinion in Mildner v. Gulotta, supra, includes the following:

> While it is generally true that due process does not require a state to provide litigants with appellate review, the same is not true where, as here, the state has failed to provide for a full and fair hearing in the court of original jurisdiction. (p 223)

It appears to petitioner that several of his procedural and substantive rights have been violated during the course of the proceedings in this case. It further appears to petitioner that the violation of his rights - in particular, his right to a hearing on the merits of his constitutional claims and his right to at least one appeal in the courts below - is flagrant enough to invite the attention of this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a Writ of Certiorari be granted.

ROBERT J. NEVILLE
Petitioner, pro se

APPENDIX

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT

900 Ellison Avenue
Westbury, N. Y. 11590
(516) 832-8585

August 7, 1985

Mr. Robert J. Neville
P. O. Box 31 RCU
New York, NY 10185

Re: File No. 13581-N
Walter D. O'Hearn, Jr., Esq.

Dear Mr. Neville:

All records pertaining to the investigation of complaints of alleged misconduct by attorneys are required by law to be kept confidential. Accordingly, our Committee is unable to be of assistance to you.

Very truly yours,

FRANK A. FINNERTY, JR.

Chief Counsel

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 8, 1985.

HON. MILTON MOLLEN, Presiding Justice,
HON. LEON D. LAZER,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
HON. JAMES F. NIEHOFF, Associate Justices.

In the Matter of Robert J. Neville,

Petitioner,

v Order

The Grievance Committee for the Tenth Judicial District,

Respondent.

In the above entitled matter, the above named Robert J. Neville, petitioner, having made two applications to this court, dated August 16, 1985 and September 17, 1985, respectively, to compel the respondent (1) to disclose to said petitioner all of the facts con-

cerning its alleged investigation of his complaint against a certain attorney and counselor at law, Walter D. O'Hearn, Jr., (2) to reveal to the petitioner whether there is now pending any investigation or proceeding concerning any alleged professional misconduct by said attorney and (3) to describe any such investigation and proceeding;

Now, upon the said applications and the papers annexed thereto in support of the said applications; and upon all the papers filed herein; and the matter having been submitted by Robert J. Neville, petitioner pro se, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said applications are hereby denied.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of February A. D. 1986

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

In the Matter of Robert J. Neville,

Appellant,

vs.

The Grievance Committee for the Tenth Judicial District,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW

Clerk of the Court

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of February A. D. 1986

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

In the Matter of Robert J. Neville,

Appellant,

v.

The Grievance Committee for the Tenth Judicial District,

Respondent.

On reading and filing the annexed consent, it is

ORDERED, that the appeal taken as of right by the appellant in the above cause to this Court, by notice of appeal dated December 4, 1985, be and the same hereby is withdrawn and discontinued.

DONALD M. SHERAW

Clerk of the Court

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of March, A. D. 1986

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

In the Matter of Robert J. Neville,

Appellant,

v.

The Grievance Committee for the Tenth Judicial District,

Respondent.

Motions having heretofore been made herein upon the part of the appellant (1) for reargument of motion for leave to appeal to the Court of Appeals and (2) for recusal of Chief Judge Wachtler from participation in the said motion for reargument of motion for leave to appeal, papers having been submitted on the motions and due deliberation having been thereupon had, it is

ORDERED, that the said motion for recusal of Chief Judge Wachtler be and the same hereby is denied; and it is

ORDERED, that the said motion for reargument of motion for leave to appeal be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW

Clerk of the Court

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. FRANCIS X. BECKER,
Justice.

PART 18, NASSAU COUNTY
INDEX NUMBER: 21412/85
MOTION DATE: March 24, 1986 (sic)

In the Matter of ROBERT J. NEVILLE,

Petitioner,

- against -

FRANK A. FINNERTY, JR., KENNETH J. LUCEY, and the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

Upon the foregoing papers (sic), it is ordered that this motion by respondent (sic) to dismiss is granted and judgment is hereby granted in favor of respondent dismissing the petition.

Not only does this court lack the requisite jurisdiction to grant the

requested relief (see Jud. Law §90(10)), the Appellate Division and the Court of Appeals have already held that such relief is inappropriate. (See Matter of Neville ___ AD2d ___; ___ NY2d ___.)

This order concludes this proceeding assigned to me pursuant to Part 202 of the Uniform Rules for New York State Trial Courts (22 NYCRR 202.1 et seq.).

Dated: April 16, 1986

ENTERED:

April 18, 1986

HAROLD W. McCONNELL

Clerk of Nassau County

AMENDED ORDER

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 11, 1986.

HON. MILTON MOLLEN, Presiding Justice,
HON. LEON D. LAZER,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
HON. JAMES F. NIEHOFF, Associate Justices.

In the Matter of Robert J. Neville,

Appellant,

v Order

Finnerty, Jr., Chief Counsel et al.,

Respondents.

The appellant having made a motion to transfer to another judicial department an appeal from a judgment of the Supreme Court, Nassau County, entered April 18, 1986; for leave to appeal to the Court of Appeals; and for other

relief; and the respondents having cross moved to dismiss the appeal;

Now, upon the papers filed in support of and in opposition to the motion, and upon the papers filed in support of the cross motion and the papers filed in opposition thereto, it is

ORDERED that the motion is hereby denied in all respects; and it is further

ORDERED that the cross motion is hereby granted and appeal dismissed, without costs.

Enter:

Acting Clerk of
Appellate Division

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of September, A. D. 1986

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

In the Matter of Robert J. Neville,

Appellant,

vs.

Frank A. Finnerty, Jr., Chief Counsel, et al.,

Respondents.

Motions having heretofore been made herein upon the part of the appellant (1) for leave to appeal to the Court of Appeals, and (2) for recusal of Chief Judge Wachtler in the above cause, and a cross motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken as of right by appellant in the above cause

to this Court, papers having been submitted on the motions and cross motion and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said cross motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED that the said motion for recusal of Chief Judge Wachtler was referred to the Chief Judge and his denial of that motion is here noted.

DONALD M. SHERAW

Clerk of the Court

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of October, A. D. 1986

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

In the Matter of Robert J. Neville,

Appellant,

vs.

Frank A. Finnerty, Jr., Chief Counsel, et al.,

Respondents.

Motions for reargument of motion for leave to appeal to the Court of Appeals and to strike respondents' answering papers on previous motion in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion for reargument of motion for leave to appeal be and the same hereby is denied with twenty dollars costs; and it is

ORDERED, that the said motion to strike respondents' answering papers on previous motion be and the same hereby is denied as untimely.

Judge Kaye took no part.

DONALD M. SHERAW

Clerk of the Court

(Petitioner notes that the Court's description of his motion to strike is not accurate.)

PETITIONER'S ARGUMENTS IN THE COURTS BELOW

1. THE CONFIDENTIALITY IMPOSED BY SECTION 90, SUBDIVISION 10, OF THE JUDICIARY LAW DOES NOT APPLY TO PARTIES TO THE COMPLAINT PROCESS; IT APPLIES ONLY TO NONPARTIES; Judiciary Law § 90(10) is invalid (see "6" and "7", below), and may not be invoked.

2. The confidentiality provision does not in this case constitute a specific statutory exemption to the provisions of the Freedom of Information Law ("FOIL"); FOIL must be liberally construed and statutory exemptions narrowly interpreted (Washington Post Co. v. N.Y.S. Insurance Dept., 61 NY2d 557, 564; 1982).

3. The Grievance Committee is not a court, but rather an agency thereof; it operates independently of the court; it is an "investigative and prosecutorial instrumentality" (Matter of New York News [Roy M. Cohn], 113 AD2d 92, 93; 1st Dept, 1985); it does not enjoy a general or blanket exemption from the provisions of FOIL (FOIL defines the "judiciary," which is exempt, as "the courts of the state" [§ 86(1)]).

4. With good cause existing, grievance committees may, and do, provide information about complaints to the parties involved; good cause exists for release of the records sought in this matter, because of proven misconduct on the part of the Grievance Committee.

5. Complainants have statutory and common-law rights of access to information about the handling of their complaints against attorneys. The common-law rule, recognized in Matter of Egan, 205 NY 147 (1912), is that when not detrimental to the public interest the right to inspect records compiled by a government agency exists as to persons who have sufficient interest in the subject matter.

6. THERE IS A CONSTITUTIONAL RIGHT OF PUBLIC ACCESS TO ATTORNEY DISCIPLINARY PROCEEDINGS; that right is defeated by a refusal to reveal whether a certain formal disciplinary proceeding is pending; (petitioner is, moreover, a virtual complainant in the matter, having provided evidence to the Grievance Committee).

7. Judiciary Law § 90(10) is in conflict with the open courts statute

(Judiciary Law § 4).

8. Denial of petitioner's applications to the Appellate Division in the prior proceeding, Matter of Neville v. Grievance Committee, was an abuse of discretion as a matter of law.

9. Judiciary Law § 90(10) does not confer exclusive jurisdiction on the Appellate Division to adjudicate controversies over the meaning, application and validity of the statute. (See, e.g., Gerzof v. Gulotta, 87 Misc. 2d 768, 1976, and Matter of Pasik v. State Board of Law Examiners, 114 Misc. 2d, 397, 1982.)

10. RES JUDICATA IS A SHAM DEFENSE.

11. Dismissal of the petition was an error of law.

12. The constitutional, statutory and common-law rights involved in this cause are substantial enough to invoke the due process guarantee.

13. The Appellate Division is biased and has sat in judgment of its own cause; petitioner's activities have been sufficient to create a probability of bias too high to be constitutionally

tolerable. (See Withrow v. Larkin, 421 U.S. 35, 46; 1975.)

14. An appeal lies as of right when the Appellate Division should have addressed a substantial constitutional question presented to it but, without good reason, failed to do so.

15. EVERY LITIGANT IS ENTITLED TO AT LEAST ONE APPEAL.

16. AN APPEAL CANNOT BE DISMISSED WITHOUT CAUSE.

17. DENIAL OF APPELLATE REVIEW IS A DENIAL OF DUE PROCESS OF LAW WHERE THERE HAS BEEN A DENIAL OF DUE PROCESS IN THE TRIBUNAL OF FIRST INSTANCE. (Ohio v. Akron Park Dist., 281 U.S. 74, 80, 1930; Mildner v. Gulotta, 405 F.Supp. 182, 223, 1975.)

18. IT IS UNCONSTITUTIONAL FOR THE JUDICIARY TO CONTINUE TO DENY PETITIONER HIS DAY IN COURT.

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(This is the table of contents of petitioner's memorandum of law submitted to the Appellate Division on September 17, 1985 in Matter of Neville v. Grievance Committee.)

JUDICIARY LAW § 90(10)

Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby

or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

RELATED CASES

As a defendant, respondent or principal witness, Walter D. O'Hearn, Jr. was involved in the following trials and proceedings referred to, directly or indirectly, in the petition:

Hellenic Lines, Ltd. v. O'Hearn et al., 80 Civ 7197, US Dist Ct, SDNY (1980); 523 F.Supp 244 (1981); 94 FRD 48 (1982).

Matter of John W. McGrath Corporation, Cases ST-74 and SR-69, Waterfront Commission of New York Harbor, Administrative Proceeding (1981).

Matter of Walter D. O'Hearn, Jr., 89 AD2d 184 am, rearg gr 92 AD2d 925 (1983).

Matter of Walter D. O'Hearn, Jr., Esq., Complaint of Professional Misconduct (Robert J. Neville, complainant), File Numbers 197/80 (Departmental Disciplinary Committee for the First Judicial Department) and 13581/N (Grievance Committee for the Tenth Judicial District).

United States v. Douglas LaChance, 80 Cr 102, US Dist Ct, SDNY (1980); 652 F2d 55 (2d Cir. 1981), cert. denied, 452 US 961 (1981).

United States v. Walter D. O'Hearn, Jr., 79 Cr 30, US Dist Ct, SDNY (1979).

United States v. Anthony M. Scotto and Anthony Anastasio, 79 Cr 32, US Dist Ct, SDNY (1979); 641 F2d 47 (2d Cir, 1980); cert. denied, 452 US 961 (1981).

ERRATA

Page iii. After the Mildner v. Gulotta citation, add: "affd 425 U.S. 901."

Page 2. The excerpt from the Fourteenth Amendment should read: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state," etc.

Page 6, line 9. After "before any court decisions had been made," add: "; petitioner reasserted the right at every stage of the proceedings thereafter."

Page 10, line 4. After "'considerably impaired,'" add: "that he had 'committed fraud, deceit and misrepresentation,' and that he," etc.

Page A-18, ¶ 9. After the Matter of Pasik citation, add: "mod 102 AD2d 395 (1984)."

86-1139

Supreme Court, U.S.
FILED
JAN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT J. NEVILLE,

Petitioner,

- against -

FRANK A. FINNERTY, JR., Chief Counsel,
KENNETH J. LUCEY, Chairman, and the
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT.

Respondents.

SUPPLEMENT TO APPENDIX
(PETITION FOR WRIT OF CERTIORARI)

ROBERT J. NEVILLE
Petitioner, pro se
5-31 50th Avenue
Long Island City
New York 11101
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January 9, 1987

SUPPLEMENT TO APPENDIX

This is a continuation of the appendix to the petition for Writ of Certiorari. Before the supplementary material is appended, two omissions in the petition will be noted. The following should have appeared as the first paragraph in the "Statement of the Case" on page 2:

> Petitioner's First Amendment claims arose upon the respondents' refusal to reveal whether a certain formal disciplinary proceeding is pending.

This fact, which deserves some emphasis, might not otherwise be clear to the reader until page 11. The citations in this matter have only recently been obtained and are as follows: Matter of Neville v. Grievance Committee, 67 NY2d 602, 758, 918 (1986); Matter of Neville v. Finnerty, et al., 68 NY2d 790, 911 (1986). The decisions of the lower courts were apparently not reported.

The petition for Writ of Certiorari might be found lacking in that it does not demonstrate the substantial nature of petitioner's First Amendment claims. While it appears to petitioner that a refusal to reveal whether a judicial proceeding is pending is a violation of First Amendment rights regardless of whether a proceeding is in fact pending, silence when no proceeding is or should be pending is obviously the less flagrant violation of the two. Without a requirement for some showing that the silence might be pernicious, a petitioner in a Freedom of Information Law ("FOIL") proceeding could append to his information request a demand for information about the pendency of a proceeding and thereby elevate his FOIL proceeding to a federal case on the strength of a demand which may be gratuitous. Not wishing to appear to

fall into that category, petitioner sees the need to show that the respondents' silence in this case is pernicious.

Demonstrating that a formal proceeding to discipline Walter O'Hearn should be pending is one way to accomplish this. A simple reference to the suppression of information by the Grievance Committee is no substitute for a description of what was suppressed.

A failure by the Grievance Committee to bring additional formal charges against O'Hearn would in petitioner's view constitute a perpetuation of its fraud on the public, and would seem to entail some risk. New charges may well have been filed in the case.

Petitioner provided the Grievance Committee with 250 pages of information concerning this matter in April 1985. The "List of Offenses" (adapted from a "Table of Offenses") which follows

is a list of allegations of wrongdoing* by Walter O'Hearn - some proved and some not - in 30 categories. Between 75 and 122 individual acts of wrongdoing have been identified. The Grievance Committee charges included less than one half of the crimes in one category (no. 29) and even those were not accurately described, their seriousness being minimized.

Walter O'Hearn was the president of his company (McGrath Services Corporation, the parent company), and was in a position to prevent the commission of crimes by company employees.

It is not intended that this List of Offenses provide the detail necessary for a full understanding of the allegations.

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* "Admitted," following an allegation, means only that the facts were conceded to be true; wrongdoing was not admitted. O'Hearn maintains that he has never done anything unethical. Items preceded by an asterisk (*) were brought to the attention of the Grievance Committee by petitioner in a letter dated December 9, 1981.

LIST OF OFFENSES

*1. Allowing commercial bribery by William Montella, General Manager of Quin Marine Services, Inc., a McGrath company (admitted); allowing overbilling by Quin. Montella apparently committed hundreds of felonies and stole millions of dollars from McGrath corporate customers, probably splitting it with O'Hearn.

*2. Authorizing Montella to accept illegal kickbacks from suppliers. (Admitted)

*3. Allowing Montella to make illegal payments to union officials. (Admitted)

*4. Advising Montella to steal from their own company in lieu of a raise. (Proved by the testimony of Montella.)

5. As chairman of McGrath Services Corporation, failing to report Montella to McGrath stockholders. (Admitted)

6. Failing to report Montella to the District Attorney or the United States Attorney. (Admitted)

7. Failing to report Montella to the Waterfront Commission; testifying before the Commission about Montella's honesty. (Admitted)

8. Allowing bribery by Robert J. Nicol

(the Nicol-Braunstein payments). (Admitted)

9. Allowing bribery by Heiman G. Gross (the Gross-LaChance payments). (Admitted)

*10. Defrauding Lucille Kritikos, an elderly woman.

11. Soliciting information protected by the attorney-client privilege.

12. Conducting a legal proceeding based wholly on deceit: the Appellate Division appeal of the Waterfront Commission's denial of Montella's license (before it learned of his criminal activities).

*13. Conspiring with Montella to split an illegal commission.

14. Re meetings with Anthony Pimpinella and John Marano.

15. Making a $10,000 payment to New Jersey ILA official Willie Murphy.

16. Re theft of Waterfront Commission assessments by Montella.

*17. Mail and wire fraud.

18. Personal income tax fraud.

*19. Theft of services in Southampton.

*20. While acting in a fiduciary capacity, fraud in the estate of John W.

McGrath, at a cost to trust beneficiaries of two million dollars; perjury.

*21. With law clients Anne and Raymond J. O'Brien and while acting in a professional capacity, looting the estate of Eileen F. McGrath; perpetrating a fraud on the Surrogate's Court.

22. Possible concealment of subpoenaed evidence.

23. Failing to make restitution to the numerous steamship companies defrauded by McGrath; refusing demands for restitution.

24. Perjury, 1979-1982.

25. Four miscellaneous items, including possible approval of or acquiescence in the arrangements made by a McGrath director to kill Douglas LaChance and another union official; allowing Mob-connected elements and thugs to operate at McGrath.

*26. Making false sworn statements to the Waterfront Commission. (Admitted)

*27. Corporate income tax fraud. (Admitted)

28. Raising cash in an illegal manner. (Admitted)

*29. Making $210,000 in illegal payments

to Anthony M. Scotto of the International Longshoremen's Association. (Admitted)

30. Making $40,000 in illegal payments to Douglas LaChance, president of the Newspaper and Mail Deliverers Union, on behalf of Metropolitan News Company, a McGrath subsidiary. (Admitted)

Petitioner has not substantiated all of the above allegations. Some, such as those numbered 10, 13, 15 and 18, appear in public records with little or no supporting evidence. Even if most of the allegations were eliminated, however, a proven record of egregious wrongdoing would remain.

With the complicity of the Grievance Committee, sham mitigating factors (which had been rejected by the administrative judge at the Waterfront Commission hearing) were advanced by the respondent at the disciplinary proceeding. In fact,

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* See the footnote on page A-28.

seven of the ten aggravating factors recognized in the ABA Standards for Imposing Lawyer Sanctions (1986) were present.

Cases relating to matters referred to in the allegations, in addition to those cited on page A-24, are:

Matter of Quin Marine Services, Inc. v. Waterfront Commission of New York Harbor, 64 AD2d 554 (1st Dept, 1978);

United States v. Clemente et al., 79 Cr 142, US Dist Ct, SDNY, 1979; 640 F2d 1069 (2d Cir, 1981), cert. denied, 454 US 820 (1981);

United States v. McGrath Services Corporation;

United States v. Montella (1978);

United States v. Quin Marine Services, Inc.; and

United States v. David Rosen; all US Dist Ct, SDNY, 1979, except as noted.

ROBERT J. NEVILLE
Petitioner, pro se

[Supplement to Appendix, pages A-25 to A-33; January 9, 1987]

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 86-1139

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT J. NEVILLE,

Petitioner,

- against -

FRANK A. FINNERTY, JR., Chief Counsel,
KENNETH J. LUCEY, Chairman, and the
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT,

Respondents.

REPLY MEMORANDUM OF PETITIONER

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(718) 361-7400

January 30, 1987

No. 86-1139

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT J. NEVILLE,

Petitioner,

- against -

FRANK A. FINNERTY, JR., Chief Counsel, KENNETH J. LUCEY, Chairman, and the GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondents.

REPLY MEMORANDUM OF PETITIONER

I am the petitioner, pro se, in this proceeding.

In a letter to the Clerk of this Court dated January 21, 1987, the respondents waived their right to file a brief

in opposition to the petition for a Writ of Certiorari. The letter, signed by Lawrence S. Kahn, Deputy Solicitor General of the State of New York, reads in its entirety:

> Because the petition for certiorari filed in the above-entitled case raises no issues warranting review by this Court, respondent waives the right to file a brief in opposition.

If the respondents had merely waived their right to file a brief, I would probably have no right to reply to their waiver; surely, I would have no desire to reply. They have, however, given a reason for their decision -- a substantial reason which is in fact a legal argument which strikes at the heart of this proceeding. It is an argument which this Court need not take at face value, and it is one to which I believe I have a right to reply.

The respondents have consistently

maintained that the issues raised in this case do not merit judicial review,* and their waiver of January 21st would be unremarkable if they had previously waived the right to submit papers in opposition to mine. This waiver is, however, a striking departure from their conduct in the courts below.

The record in this case is perhaps 200 pages long - in a matter in which there has been no judicial proceeding on the merits - and the respondents have written almost as much as I have. The truth is that they have been fighting me tooth and nail. They have vigorously opposed every motion that I have made (including a motion to stay the proceeding that I brought against them); they have devoted their efforts not to addressing my contentions but to arguing

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* (The footnote appears on page 6.)

that the State courts should not consider them; they appeared in court one day (as I did) when neither side was expected to attend; they rejected my offer to settle the case by an arrangement in which I would waive my constitutional claims and treat as confidential all information provided by the Grievance Committee; and the Attorney General has in his legal papers in the case charged me with harassment and abuse of the judicial process.

If the respondents could substantiate their assertion that this case raises no issues warranting review by this Court, they would do so; they would spare no expense. In an affidavit dated July 1, 1986 and filed in support of the motion for leave to appeal to the New York State Court of Appeals, I stated that "they (the respondents) are almost always wrong, and yet the courts have gone along with them, because of who they are."

It appears that the right to file a brief was waived not for the reason given, but because the respondents are reluctant to expound any of their arguments in this Court.

January 30, 1987

Respectfully submitted,

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FOOTNOTE

(from page 3)

The actual demands which were made on the respondents have not previously appeared in the papers filed in this Court. The conclusion of the petition, dated February 20, 1986, in the proceeding under CPLR Article 78 for a judgment in the nature of mandamus appears below. The issues raised by these demands are those which the respondents have consistently maintained do not warrant judicial review.

23. Petitioner has a clear legal right to the information he demands. He asks that the respondents be compelled to perform the duties imposed upon them by the common law, by the Freedom of Information Law, by the Code of Professional Responsibility, and by the Constitutions of the United States and the State of New York and provide that information.

WHEREFORE, petitioner requests that judgment be entered:

(a) Directing the respondents to release to petitioner forthwith, pursuant to the common law and the provisions of the Freedom of Information Law, either by mail or by allowing the inspection and copying

of records by petitioner, all of the material facts concerning the investigation of his complaint against Walter D. O'Hearn, Jr.;

(b) Directing the respondents to reveal to petitioner, as a virtual complainant and in accordance with his constitutional right of access to judicial proceedings, whether there is now pending any proceeding concerning any alleged misconduct by Walter D. O'Hearn, Jr. which was brought to the attention of the Committee by petitioner or concerning which he has furnished evidence;

(c) Directing the respondents to allow petitioner, in accordance with his constitutional right, access to any such pending proceeding;

(d) As a form of interim relief, staying any such proceeding pending the determination of this application;

(e) Directing the respondents to disclose to petitioner forthwith, in accordance with established standards of legal ethics and pursuant to the Freedom of Information Law, full and complete information about their communications with the Appellate Division concerning his applications to that Court while the same were pending; and

(f) Granting petitioner such other and further relief as may be just and proper.

(End of Footnote)